Supreme Court, U.S.
FILED
NOV 6 1996
CLERK

No. 96-563

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

HARTLEY MARINE CORP., THE OHIO RIVER COMPANY, and CROUNSE CORPORATION,
Petitioners,
v.
JAMES H. PAIGE III, STATE TAX COMMISSIONER OF WEST VIRGINIA,
Respondent.

On a Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF OF AMICUS CURIAE TAX EXECUTIVES INSTITUTE, INC. IN SUPPORT OF PETITIONERS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

15 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
CONCLUSION	11

TABLE OF AUTHORITIES

CASES: Page

American Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987) 8
Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) 3, 5
Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977) 3, 4-5
Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 7, 8
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) ..... *passim*
Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77 (1938) 4
Cooper v. Aaron, 358 U.S. 1 (1958) 10
Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972) 7-8
Exxon Corp. v. Department of Revenue, 447 U.S. 207 (1980) 6
Freeman v. Hewit, 329 U.S. 249 (1946) 5
Helson & Randolph v. Kentucky, 279 U.S. 245 (1929) 4, 9-10
Hutto v. Davis, 454 U.S. 370 (1982) 10
Quill Corp. v. North Dakota, 504 U.S. 298 (1992) .. 10
Reidy Terminal, Inc. v. Director of Revenue, 898 S.W.2d 540 (Mo. 1995) 7-8
The Mayor v. Cooper, 73 U.S. (6 Wall.) 247 (1867) 10
Trinova Corp. v. Michigan Dep't of Treasury, 498 U.S. 358 (1991) 6
United Air Lines, Inc. v. Mahin, 410 U.S. 623 (1973) 9-10
Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938) 7
Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940) .. 3, 5

FEDERAL CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. XIV, § 1 5
U.S. Const. art. I, § 8, cl. 3 4

TABLE OF AUTHORITIES—Continued

STATE STATUTES: Page

W. Va. Code § 11-15-18(c) (6) (B) (1996) 8
W. Va. Code § 11-15A-13(a) (2) (1996) 6
W. Va. Code § 11-15A-13(g) (1996) 6

MISCELLANEOUS:

Oliver W. Holmes, *Law and the Court*, COLLECTED LEGAL PAPERS 291 (Reprint 1952) 9

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BRIEF OF AMICUS CURIAE TAX EXECUTIVES INSTITUTE, INC. IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

Pursuant to Rule 37 of the Rules of this Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of the Petitioners.[1] Tax Executives Institute (hereinafter "TEI" or "the Institute") is a voluntary, nonprofit association of corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 and has approximately

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[1] TEI has requested and received the written consents of the Petitioners and the Respondent to the filing of this brief; those consents have been filed with the Clerk of this Court.

5,000 members who represent more than 2,700 of the leading corporations in the United States and Canada.

TEI is dedicated to promoting the uniform and equitable enforcement of the tax laws throughout the Nation, to reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers, and to vindicating the Commerce Clause and other constitutional rights of all business taxpayers. The members of the Institute represent a cross-section of the business community in North America and are involved in many forms of interstate commerce, including the use of the Ohio River and other navigable waterways. TEI's members will thus be directly affected by the Supreme Court's decision whether to grant a writ of certiorari in this case in one of two ways. First, they may bear the economic burden of the use tax imposed by West Virginia. Secondly, they may be the target of similarly constitutionally deficient legislation in the event that the decision below emboldens other states to follow West Virginia's lead.

One issue presented by this case is the constitutionality of a dedicated use tax that is not fairly related to the services rendered to the taxpayers on whom it is imposed. Thus, the case implicates the effect of the Commerce Clause on interstate river traffic and the application of the Supreme Court's decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). *Amicus* TEI submits that a writ of certiorari should be issued here so that the Court may vivify the Commerce Clause by holding that the Constitution does not permit the imposition of a use tax on fuel consumed by watercraft navigating the waterway, including towboats and other vessels that never stop in the State.

Because TEI members and the companies by whom they are employed will be materially affected by the Court's decision, the Institute has a special interest in the outcome of this case.

SUMMARY OF ARGUMENT

1. Under the Commerce Clause of the Constitution, a State may not tax value outside its borders. Such taxation is proscribed because the "fundamental purpose of the [Commerce] Clause is to assure that there be free trade among the several States," *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 335 (1977), and because extraterritorial taxation offends fundamental notions of due process and constitutes an "unreasonable clog upon the mobility of commerce," *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935).

If the State has not "given anything for which it can ask return" in respect of the person, property, or transaction it seeks to tax, *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940), the Commerce Clause operates as a constitutional brake upon the State's raw power to tax. It is for this Court to act as the brakeman and ensure that the balance struck between the rights of taxpayers and the rights of States is a reasonable one.

The tax at issue here is dedicated to the construction and maintenance of West Virginia's highway system. It is imposed, however, on taxpayers who may never use that system. The tax thus fails the test set forth by this Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), because it is not fairly related to the services rendered by the State. In this case, the West Virginia Supreme Court of Appeals properly held under the *Complete Auto Transit* test that, in assessing the constitutionality of the use tax, the pertinent inquiry is whether the levy is reasonably related to the taxpayer's contact with the taxing state. The court failed to recognize, however, that here there is no relationship—fair or otherwise—between the benefits conferred upon the taxpayers by West Virginia and the fuel use taxes paid by Petitioners.

The question is whether West Virginia has exerted its power in proper relation to the taxpayers' activities

in the State and to the taxpayers' consequent enjoyment of the opportunities and protections that the State has afforded. The answer is a resounding no. *Amicus* TEI submits that West Virginia's fuel use tax is not fairly related to the services rendered by the State and should be struck down.

2. Even before the Court's landmark decision in *Complete Auto Transit*, it was clear that fuel consumption taxes could not be imposed with impunity. In *Helson & Randolph v. Kentucky*, 279 U.S. 245, 252 (1929), this Court struck down a consumption tax indistinguishable from the one at issue here because it was "exacted as the price of the privilege of using an instrumentality of interstate commerce."

The State of West Virginia acknowledged the *Helson* line of cases, but sought to minimize their significance by rationalizing that the decisions predated this Court's decision in *Complete Auto Transit*. The passage of time and the rendering of intervening decisions do not, by themselves, vitiate the precedential value of this Court's decisions.

Quite simply, there is no relationship between the consumption tax on towboat fuel imposed by West Virginia and the provision of the state highway services to which that tax was dedicated. The tax should therefore be struck down as unreasonably clogging interstate commerce and thereby contravening the Commerce Clause.

ARGUMENT

I.

Under the Commerce Clause of the United States Constitution,[2] a State may not tax value outside its borders. *E.g., Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 80-81 (1938). Such taxation is proscribed be-

[2] U.S. Const. art. I, § 8, cl. 3.

cause the "fundamental purpose of the [Commerce] Clause is to assure that there be free trade among the several States." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 335 (1977). In tandem with the Due Process Clause,[3] the Commerce Clause acts to prevent States from enacting unfair tax statutes and thereby imposing an "unreasonable clog upon the mobility of commerce." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935).

Given the purpose and intent of the Commerce Clause, "[s]tate taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys." *Freeman v. Hewit*, 329 U.S. 249, 252, 253 (1946). Hence, a balance must be struck between the State's unassailable need for revenue to fund services provided to taxpayers and the taxpayers' legitimate right to protection from overreaching taxing authorities. If the State has not "given anything for which it can ask return" in respect of the person, property, or transaction it seeks to tax, *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940), the Commerce Clause operates as a constitutional brake upon the State's raw power to tax.

It is for this Court to be the brakeman and to ensure that the balance struck between the rights of taxpayers and the rights of States is a reasonable one.[4] In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the Court established a four-prong test for determining whether a state tax statute violates the Commerce Clause. Specifically, the Court held that a tax will be sustained only if (1) it is applied to an activity with a substantial nexus with the taxing State, (2) it is fairly apportioned,

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[3] U.S. Const. amend. XIV, § 1.

[4] *See Boston Stock Exch.*, 429 U.S. at 329 (the Court has a duty "to make the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual States in exercising their taxing powers").

(3) it does not discriminate against interstate commerce, and (4) it is fairly related to the services provided by the State. *Id.* at 279. The case thus sets forth a decisional framework for balancing competing interests in determining whether a tax unduly infringes on interstate commerce. *See, e.g., Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 372-73 (1991); *Exxon Corp. v. Department of Revenue*, 447 U.S. 207, 227-28 (1980). If a statute fails to meet any prong of the test, it must be struck down as violating the Commerce Clause.

The tax at issue here fails the *Complete Auto Transit* test and should be struck down as unreasonably clogging interstate commerce.[5] Petitioners are engaged in the business of transporting products by line-haul towboats in interstate commerce on the Ohio and Mississippi Rivers and are regarded as "motor carriers" under West Virginia law. App. A at 5a (July 12, 1996, Consolidated Opinion of Supreme Court of Appeals of West Virginia).[6] Under W.Va. Code § 11-15A-13(a)(2) (1996) (App. I at 126a), West Virginia imposes a five-percent excise tax on the use and consumption of diesel fuel purchased by such motor carriers outside the State but consumed during their operations on the Ohio River. The tax, which is dedicated to West Virginia's highway system,[7] is imposed whether or not the towboats stop at a port within the State. The record demonstrates that Petitioners' towboats frequently did not stop at West Virginia ports. App. A at 6a.

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[5] The West Virginia tax also implicates other constitutional and statutory issues raised in the Petition for a Writ of Certiorari filed in this case, including the Duty of Tonnage and Supremacy Clauses, federal statutes, and the Northwest Ordinance and Virginia Compact. *Amicus* TEI, however, confines this brief to the threat the decision below poses to the Commerce Clause.

[6] References to "App." are to the appendix filed with Hartley Marine Corp., The Ohio River Company, and Crounse Corporation's Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia (No. 96-563).

[7] W. Va. Code § 11-15A-13(g) (1996) (App. I at 129a).

The Supreme Court of Appeals of West Virginia properly held that, in assessing the constitutionality of the use tax, the pertinent inquiry is whether the levy is reasonably related to the taxpayer's contact with the taxing state, "since it is the activities or presence of the taxpayer in the state that may properly be made to bear a 'just share of state tax burden'." App. A at 19a-20a, *citing Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981) (which itself quoted *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938)). The West Virginia court, however, disregarded the dedicated nature of the tax—which is to be used for the construction, repair, and maintenance of the State's highway system—and dismissed the Petitioners' claim that the tax is *not* fairly related to the services provided by the State. It therefore concluded that the tax does not run afoul of the Commerce Clause. App. A at 19a-23a. In so holding, the court ignored a critical difference between the West Virginia tax and the Montana severance tax at issue in *Commonwealth Edison*—namely, that the tax imposed by Montana was for the general support of the government, whereas the West Virginia levy constitutes a dedicated use tax for the maintenance of the State's highway system.[8] The State here is not seeking to be compensated for local services rendered to the taxpayers. Rather, it is seeking to tax the process of transit itself.

In this case, there is no relationship—fair or otherwise—between the benefits conferred upon the taxpayers by West Virginia and the fuel use taxes paid for traveling the navigable interstate waterways. This is not a case where the tax is assessed in proportion to the taxpayers' activities within the State. *See Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707,

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[8] Apparently without recognizing the significance, the court below quoted *Commonwealth Edison* to the effect that "States have considerable latitude in imposing *general* revenue taxes." App. A at 17a n.13 (emphasis added).

716-17 (1972) (the state toll must bear "some fair approximation of use or privilege for use"); *Reidy Terminal, Inc. v. Director of Revenue,* 898 S.W.2d 540, 542-43 (Mo. 1995) (surcharge dedicated to insurance fund invalid with respect to taxpayer ineligible to receive benefits). Taxpayers' towboats simply do not use West Virginia's roads.[9] "[W]hen the measure of a tax bears no relationship to the taxpayers' presence or activities in a State, a court may properly conclude under the fourth prong of the *Complete Auto Transit* test that the State is imposing an undue burden on interstate commerce." *Commonwealth Edison Co. v. Montana,* 453 U.S. at 629 (citations omitted).

The question here is, then, whether West Virginia has exerted its power in proper relation to the taxpayers' activities in the State and to the taxpayers' consequent enjoyment of the opportunities and protections that the State has afforded. The answer is a resounding no. The tax at issue here does not even purport to approximate fairly the cost or value of the use of West Virginia's roads by taxpayers, because taxpayers do not necessarily use those roads. *See American Trucking Ass'ns v. Scheiner,* 483 U.S. 266, 290 (1987) (striking down Pennsylvania's flat tax on truck operations). That the West Virginia statute overreaches is demonstrated by its extension not only to towboats and other watercraft but also to aircraft. W. Va. Code § 11-15-18(c)(6)(B) (1996) (App. I at 131a). Hence, any airplane veering into West Virginia airspace would facially be liable for the use tax. Indeed,

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[9] The lower court's finding of "benefits" enjoyed by Petitioners does not pass muster. The court averred that the taxpayers' commodities are shipped over West Virginia roads and that their employees drive to the docks. App. A at 22a n.18. Such a rationalization fails on two grounds: First, the tax applies even when the taxpayers' barges do not stop within the State (so-called pass-through traffic); and secondly, these activities already bear a portion of the fuel use tax—the tax is imposed on the fuel used to transport the goods (or employees) over land.

depending on the State's interpretation of the word "aircraft" and the type of fuel used, the tax might arguably extend to spacecraft orbiting above West Virginia. This possibility, while concededly farfetched, illustrates the lengths to which States may go to assert their taxing authority in the absence of a vigorously enforced Commerce Clause.

For the foregoing reasons, *amicus* TEI submits that West Virginia's fuel use tax fails the fourth prong of the *Complete Auto Transit* test in that it is not fairly related to the services rendered by the State. The statute constitutes an unreasonable clog on free trade among the States and hence "embodies what the Commerce Clause was meant to end." *See* Oliver W. Holmes, *Law and the Court,* COLLECTED LEGAL PAPERS 291, 295-96 (Reprint 1952). A writ of certiorari should be issued and the decision below should be reversed.

II.

Even before the Court's landmark decision in *Complete Auto Transit*, it was clear that fuel consumption taxes could not be imposed with impunity. In *Helson & Randolph v. Kentucky*, 279 U.S. 245 (1929), this Court considered a consumption tax indistinguishable from the one at issue here. *Helson* involved a Kentucky tax on the use of gasoline purchased out of state, but consumed by ferries traveling upon the Ohio River. The Court held that the tax violated the Commerce Clause because it was "exacted as the price of the privilege of using an instrumentality of interstate commerce." *Id.* at 252. Almost 50 years later, the Court reaffirmed the *Helson* decision in *United Air Lines, Inc. v. Mahin*, 410 U.S. 623 (1973). In upholding an Illinois tax on aviation fuel *stored* within the State, the Court referred to the "line drawn between an impermissible tax on mere consumption of fuel, as in *Helson*, and a permissible tax on storage of fuel before

loading." 410 U.S. at 629. Retaining this distinction, the Court said, minimized the danger of double taxation and provided "a source of revenue having a relation to the event taxed." *Id.* at 629-30. The Court observed that "a State in which pre-loading storage facilities are maintained is likely to provide substantial services to those facilities, including police protection and the maintenance of public access roads." *Id.* at 630 (footnote omitted).

West Virginia acknowledged the *Helson* and *United Air Lines* cases, but sought to minimize the significance. Specifically, the State rationalized that the decisions had dubious validity because they predated this Court's decision in *Complete Auto Transit*. App. E at 62a-63a (August 14, 1990, Administrative Decision of West Virginia State Tax Commissioner).[10] The passage of time and the rendering of intervening decisions do not, by themselves, vitiate the precedential value of this Court's decisions. Indeed, rather than cavalierly discarding valid, if older, authorities, lower courts should seek to harmonize them with subsequent decisions in the absence of any contrary signal from this Court.[11] There was no such signal here. To the contrary, *Helson* and *United Air Lines* fully accord with the test enunciated in *Complete Auto Transit* that the tax under review must be "fairly related to the services provided by the State." 430 U.S. at 279. Quite simply, there is no relationship between the consumption tax on towboat fuel imposed by West Virginia and the provision of the state highway ser-

[10] The West Virginia Supreme Court of Appeals failed to even cite the cases, although the court facilely dismissed a line of cases decided before *Complete Auto Transit*. App. A at 17a n.13.

[11] It is not for the lower court to determine that a valid Supreme Court precedent should not be followed. *Quill Corp. v. North Dakota*, 504 U.S. 298, 321 (1992) (Scalia, J., concurring). *Accord Hutto v. Davis*, 454 U.S. 370, 375 (1982); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 253 (1867) (if the lower court did not adhere to Supreme Court precedent, there would be "mischievous consequences").

vices to which that tax was dedicated. The tax should therefore be struck down as unreasonably clogging interstate commerce and thereby contravening the Commerce Clause.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari in this case.

Respectfully submitted,

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November 6, 1996